

system is acquired by a BTA authorization holder, subscribers located within 35 miles of the transmitter site will continue to receive interference-free service over the MDS channels, even if they happen to be located in a BTA different from the BTA in which the transmitting antenna is located. This approach not only serves the interests of those consumers, but also promotes continued investment into existing wireless cable systems and preserves the economic value developed by current wireless cable system operators, who have developed their businesses without regard to BTA boundaries that were irrelevant to the wireless cable industry until the *MDS Auction Order* was adopted.

Given the Commission's prior acknowledgements of the importance of granting all MDS and ITFS stations comprising a wireless cable system a common PSA,^{45/} WCAI is at a loss to understand why the Commission has chosen with respect to leased ITFS stations to take an approach 180° opposite than that taken with respect to leased MDS stations. Rolling back the PSA of leased ITFS stations from 35 miles to the BTA boundary means that if a BTA authorization holder currently operates or subsequently acquires an existing wireless cable system transmitting from a site within 35 miles of the BTA boundary, the BTA authorization holder risks potential interference on its leased ITFS channels to subscribers outside the BTA. It is unclear what possible benefits the public will derive from subjecting existing service over ITFS channels to potential interference in the future. Moreover, the risk of future interference will reduce the economic value of wireless cable systems located near BTA boundaries, deterring the investment in those systems necessary to sustain growth.

^{45/}See *supra* note 39

For these reasons, the Commission should reconsider its policy with regard to the PSA of ITFS stations leased to BTA authorization holders and provide, similar to the policy for MDS, that ITFS stations leased to a BTA authorization holder will have no less than a 35 mile PSA, even if that PSA extends into an adjacent BTA.

E. The Various Interference Protection Obligations of BTA Authorization Holders, Incumbent MDS Stations and ITFS Stations Need To Be Clarified.

1. The BTA Authorization Holder Must Be Required to Cure Interference Caused To ITFS Facilities.

Newly-adopted Section 21.938(c) of the Rules requires, in pertinent part, that a BTA authorization holder cure, at its expense, any harmful electromagnetic interference caused within the 35-mile PSA of incumbent MDS stations.^{46/} However, this provision is silent as to the obligation of BTA authorization holders to protect the PSAs and receive sites of previously proposed or authorized ITFS stations. The Commission has made clear in the text of the *MDS Auction Order* that ITFS stations will generally be afforded protection from harmful interference to their PSAs and receive sites.^{47/} WCAI believes that it would be

^{46/}See 47 C.F.R. § 21.938(c).

^{47/}See *MDS Auction Order* at ¶ 41. Paragraph 41 of the *MDS Auction Order* provides that in protecting an ITFS station with a PSA in an adjacent BTA, a BTA authorization holder “must protect points on the 35-mile circle using cochannels and adjacent channel desired-to-undesired signal strength ratios of 45 dB and 0 dB, respectively.” (emphasis added). This statement does not accurately reflect the manner in which PSA protection is demonstrated, for one must protect all points within the PSA circle, as well as points on the circle. See, e.g. *MDS Auction Order* at ¶ 71 (“incumbents’ 35-mile areas are to be protected not only at points along the boundary, but also within the boundary.”); 47 C.F.R. §21.902(b)(requiring “[a]n analysis of the potential for harmful interference *within* the 56.33 km (35 mile) protected service areas of any authorized or previously proposed incumbent station.” (emphasis added)).

(continued...)

consistent with the new MDS regulatory regime to amend Section 21.938(c) to clearly require the BTA authorization holder to cure harmful interference to the previously authorized and proposed receive sites and PSA of ITFS stations, as well as the PSA of incumbent MDS stations. Accordingly, Section 21.938(c) should be revised to read:

Unless the affected parties have executed a written interference agreement in accordance with Section 21.937, it shall be the responsibility of a BTA or PSA authorization holder to correct at its expense any condition of harmful electromagnetic interference caused to authorized MDS service at locations within other BTAs or PSAs or within the 56.33 km (35 mile) protected service areas of authorized or previously proposed ITFS and MDS stations (incumbents) or at authorized or previously proposed ITFS receive sites.

(new language underscored).

2. The Commission Must Assure That ITFS Stations Authorized Or Proposed Prior To The BTA Auctions Have The Same Flexibility As Incumbent MDS Stations To Make Modifications In The Future.

As the Commission has recognized throughout the *MDS Auction Order*, it is essential that licensees of incumbent MDS station be afforded flexibility to make modifications to their facilities in the future.^{48/} By affording MDS licensees the unfettered right to make future modifications, so long as they do not exceed a power flux density ("PFD") of -73 dBw/m² at their PSA boundary, the Commission has succeeded in balancing the rights of incumbent

^{47/}(...continued)

Thus, on reconsideration the Commission should clarify that in protecting an ITFS station with a PSA in an adjacent BTA, a BTA authorization holder must demonstrate protection to all points on and within the 35-mile radius circle using cochannels and adjacent channel desired-to-undesired signal strength ratios of 45 dB and 0 dB, respectively.

^{48/}See, e.g., *MDS Auction Order* at ¶ 56.

MDS licensees *vis a vis* BTA authorization holders.^{49/} Unfortunately, the Commission has not afforded the licensees of ITFS stations authorized or proposed prior to the BTA auctions similar flexibility.^{50/}

As the Commission is well-aware, all of the channels employed by a wireless cable system must have a common configuration yielding equal receive signal levels at the reception antenna in order to avoid adjacent channel interference.^{51/} The Commission's decision to afford incumbent MDS stations flexibility to make future modifications -- the linchpin to its careful balancing of the rights of incumbents and BTA auction winners -- will be of absolutely no value to wireless cable system operators if the ITFS stations that also comprise a system cannot be modified in a similar fashion. An approach similar to that adopted with respect to incumbent MDS stations should be adopted to govern the rights of previously authorized or proposed ITFS stations on channels D4, E1-4, F1-4 and G1-4 *vis a vis* BTA

^{49/}See *id.* at ¶ 57.

^{50/}Indeed, as the ITFS Parties note in their petition, the Commission's decision to afford BTA authorization holders a BTA-wide PSA on MDS channels E1-4, F1-4 and H1-3 imposes significant restrictions on the ability of the ITFS community to propose new stations that utilize channels D4 and G1-4, or to modify existing stations utilize channels D4, E1-4, F1-4, and G1-4 without the consent of the BTA authorization holder. See ITFS Parties Petition For Reconsideration, at 6-8. WCAI is attempting to develop an approach that will not unduly restrict new ITFS facilities, while at the same time assuring the BTA authorization holder can enjoy the benefits it bid upon at auction. WCAI hopes to be able to present that approach in its response to the ITFS Parties.

^{51/}See *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 6472, 6474 (1990).

authorization holders.

Specifically, WCAI proposes that any ITFS stations authorized or proposed prior to the BTA auction should be permitted to make modifications so long as the PFD at the boundary of that station's PSA does not exceed -73 dBw/m². Solely for purposes of applying this proposal to ITFS stations that do not lease excess capacity and therefore do not have a PSA, such stations should be deemed to have a circular PSA with a radius of 35 miles centered at its then-existing transmitter site. This approach will allow ITFS station modifications on the same basis afforded incumbent MDS licensees, assuring that wireless cable systems made up of MDS and ITFS channels can make modifications in the future necessary to respond to marketplace conditions.

3. The Commission Should Clarify The Policies That Will Govern The Interference Protection Obligations Of Previously Authorized Or Proposed ITFS Stations To CITFS Facilities Licensed To BTA Authorization Holders.

A similar problem exists with respect to commercial ITFS ("CITFS") facilities licensed to BTA authorization holders under Sections 74.990 and 74.991 of the Rules. The *MDS Auction Order* states that where a BTA authorization holder secures a license for a CITFS facility, "the associated protected service area will be the entire BTA, and interference protection will be governed in the manner of protecting BTA service on MDS channels."^{52/} Read literally, this would appear to mean that the PSA of a commercial ITFS facility will extend to the border of the BTA, effectively precluding most modifications to previously

^{52/}*MDS Auction Order* at ¶ 41.

authorized or proposed cochannel ITFS facilities within the BTA.^{53/}

WCAI understands from informal discussions with the Commission's staff that the quoted language is intended to apply only *vis a vis* BTA authorization holders in adjacent markets, and was not intended to hamstring previously authorized and proposed cochannel ITFS stations from being modified. The Commission has recognized that incumbent MDS stations must have flexibility to make modifications in the future, and has crafted rules that will afford that flexibility. A similar approach should be adopted to govern the rights of previously authorized or proposed ITFS stations *vis a vis* CITFS stations licensed to BTA authorization holders.

Specifically, WCAI proposes that if a BTA authorization holder secures a CITFS authorization within its BTA,^{54/} any previously authorized or proposed ITFS station can subsequently be modified so long as the PFD at the boundary of that station's PSA does not exceed -73 dBw/m². Solely for purposes of applying this proposal to ITFS stations that do not lease excess capacity and therefore do not have a PSA, such stations should be deemed to have a circular PSA with a radius of 35 miles centered at its then-existing transmitter site. WCAI believes that this approach will allow flexibility for ITFS station modifications

^{53/}Read literally, it would also impose burdens on those proposing to construct new ITFS stations on channels cochannel with and adjacent channel to CITFS facilities. *See* ITFS Parties Petition For Reconsideration, at 6-8. As noted above, WCAI is attempting to develop an approach that will not unduly restrict new ITFS facilities, while at the same time assuring the BTA authorization holder can enjoy the benefits it bid upon at auction.

^{54/}It should be noted that in virtually all markets of any size, CITFS authorizations are not available, as sufficient numbers of vacant ITFS channels do not exist. *See* 47 C.F.R. § 74.990.

equivalent to that afforded incumbent MDS licensees, while giving BTA authorization holders sufficient certainty as to their abilities to employ CITFS facilities.

4. The Commission Should Clarify Which Incumbent MDS Facilities Will Be Permitted To Exceed the Power Flux Density Limit At the PSA Boundary.

Under the regulatory framework established by the *MDS Auction Order*, the potential for harmful electrical interference from an incumbent MDS station to facilities of a BTA authorization holder will be governed by generally limiting the PFD of the incumbent's signal to -73 dBw/m^2 at the border of the incumbent's PSA.^{55/} The Commission has recognized, however, that some incumbents currently exceed the PFD limit at the boundary of the expanded 35-mile PSA.^{56/} Paragraph 57 of the *MDS Auction Order* provides that in those cases, the Commission will permit the incumbent to continue to operate with a PFD in excess of the -73 dBw/m^2 limit, and will permit future modifications that do not result in a PFD increase at the expanded PSA border.^{57/}

To avoid any confusion in the future, the Commission should resolve an ambiguity with respect to which MDS facilities are grandfathered and entitled to exceed the PFD limitation. Paragraph 57 of the *MDS Auction Order* makes numerous references to "incumbents," implying that the Commission will afford grandfathered status to any MDS

^{55/}See *MDS Auction Order* at ¶ 57.

^{56/}*Id.* at ¶ 57 ("in a small number of cases involving directional antennas, an incumbent's power flux density may already exceed -73 dBw/m^2 , for signal paths in some directions at a distance of 35 miles").

^{57/}See *id.*

facility that meets the definition of "incumbent" set forth in newly-adopted Section 21.2 -- one that is authorized or proposed prior to September 15, 1995.^{58/} However, because of a reference to facilities that "already exceed -73 dBw/m²," Paragraph 57 arguably could be read to limit grandfathered status to only those stations that were either authorized or constructed prior to September 15th.^{59/} Moreover, because the rule expanding the PSA to a circle with a 35 mile radius does not become effective until September 18, 1995,^{60/} it could be argued that the date for establishing grandfathered status should be September 18th.

WCAI urges the Commission to clarify that grandfathered status will attach to any MDS facility that is authorized or proposed prior to September 15th and has, or proposes to have, a PFD exceeding -73 dBw/m² at its expanded PSA border. The Commission has generally afforded wireless cable system operators until September 15th to file the applications necessary to achieve their desired system designs. There is no valid reason to deny grandfathered status with respect to the PFD limitation to facilities proposed, but not yet authorized or constructed, by that date. Nor is there any particular reason to delay the date for establishing grandfathered status until the September 18th effective date of the expanded PSA rules -- such a delay would merely add unnecessary confusion.

5. The Commission Should Amend Newly-Adopted Section 21.938(e) To Conform To Its Policies Regarding The Interference Protection Obligations Of Incumbent MDS Stations.

^{58/}See *supra* at Section II.G.

^{59/}MDS Auction Order at ¶ 57 (emphasis added).

^{60/}See *supra* at note 38.

Newly-adopted Section 21.938 of the Rules is clearly intended to establish the interference protection obligations of BTA authorization holders *vis a vis* each other and incumbent facilities. It is not intended to address the interference protection obligations of incumbent MDS stations. However, because Section 21.938(e) is not by its terms specifically applicable only to BTA authorization holders, it could be read in a manner inconsistent with the policies announced in Paragraph 57 of the *MDS Auction Order*.

Paragraph 57 addresses the interference protection obligations of incumbent MDS stations with respect to the BTA authorization holders.^{61/} Under the provisions of that paragraph, except in grandfathered situations, an incumbent MDS station is required to limit the PFD of its signal to no more than -73 dBw/m² at the boundary of its expanded PSA. Newly-adopted Section 21.938(e), however, provides that “[t]he calculated free space power flux density from a station may not exceed -73 dBw/m² at locations on BTA or [partitioned service area] boundaries . . .” (emphasis added) While that accurately states the policy with respect to the obligation of BTA authorization holders to each other, it is inaccurate with respect to incumbent stations. Pursuant to Paragraph 57, incumbent stations may cause a PFD in excess of -73 dBw/m² at the boundaries of any BTA or partitioned service area, so long as they maintain their PFD within -73 dBw/m² at the boundary of their own PSA.

To eliminate any confusion that Section 21.938(e) may cause, WCAI suggests that Section 21.938(e) be amended to read as follows:

(e) The calculated free space power flux density from an MDS station (other

^{61/}See *supra* at Section II.E.4.

than an incumbent MDS station) may not exceed -73 dBw/m² at locations on the BTA or PSA boundaries for which there is an unobstructed signal path from the transmitting antenna to the boundary, unless the applicant has obtained the written consent of the authorization holder for the adjoining BTA or PSA.

(new language underscored).

6. The Commission Should Clarify That MDS and ITFS Stations Must Be Protected From Actual Harmful Interference At All Points Within The PSA.

Based on comments WCAI has received from industry participants, it appears that Paragraph 69 of the *MDS Auction Order* and newly-adopted Section 21.902(f)(6) have caused some confusion as to the interference protection analyses that will be required in the future of those who must study the potential for interference to a circular PSA with a 35 mile radius. Although, quite frankly, WCAI believes the *MDS Auction Order* was rather clear, the number of comments WCAI has received indicates that further clarification at this point may eliminate misunderstandings and disputes in the future.

Paragraph 69 describes a computer program that the Commission's staff will employ to determine if an application is acceptable for filing and the methodology of that program is reflected in Section 21.902(f)(6). Two features of that approach to determining acceptability have caused concern. First, the program will only analyze the potential for interference at 360 evenly spaced points along the PSA boundary, and will not test for potential interference within the PSA itself. Second, in calculating the desired to undesired signal level for testing against the 45 dB cochannel standard, the computer program will assume a desired signal level of -83 dBw, even though the actual received signal level at a

given point may differ.

Despite the fact that the *MDS Auction Order* specifically warns that “[t]he MDS interference standards should not be confused with the processing methods, which can only approximate the standard,”^{62/} just such confusion has resulted. To eliminate that confusion, WCAI urges the Commission to state, once again, that any proposed station required to protect the 35 mile PSA of a previously authorized or proposed station must protect all points within the PSA to the 45 dB and 0 dB cochannel and adjacent channel benchmarks using actual desired signal levels.^{63/} The Commission should also make clear that all interference analyses required of applicants must analyze all points within the PSA using the actual predicted receive signal level at each point (rather than the level of -83 dBw assumed by the Commission’s computer model). Finally, the Commission should make clear that, even if an application passes muster as acceptable for filing under newly-adopted Section 21.902(f)(6), a petition to deny that application will nonetheless be granted if the proposed facility does not protect every point within the PSA using the receive signal level actually predicted at each point.

^{62/}*MDS Auction Order* at ¶ 71.

^{63/}*See, e.g., id.* (“incumbents’ 35-mile areas are to be protected not only at points along the boundary, but also within the boundary.”); 47 C.F.R. §21.902(b)(requiring “[a]n analysis of the potential for harmful interference *within* the 56.33 km (35 mile) protected service areas of any authorized or previously proposed incumbent station.” (emphasis added)); 47 C.F.R. §21.902(f)(4)(providing mechanism for calculating desired signal level at a given point). As discussed *supra* at note 47, the *MDS Auction Order* does in one instance suggest that PSA protection is only measured at the boundary of the PSA circle, but that suggestion is clearly in error.

7. The Commission Should Restore Former Section 21.904(c)(2) of the Rules.

Until the *MDS Auction Order*, Section 21.904(c) of the Commission's Rules provided that when an applicant seeks to increase its transmitter power, it must either demonstrate non-interference to authorized or previously proposed stations in the vicinity or make demonstrations called for by Sections 21.904(c)(1), (2) and (3). Despite absolutely no discussion of the matter in either the *NPRM* or the *MDS Auction Order*, however, the version of Section 21.904 promulgated in Appendix C of the *MDS Auction Order* deletes the provisions of former Section 21.904(c)(2). WCAI urges the Commission to restore former Section 21.904(c)(2), for it is an essential component of Section 21.904(c).

The former version of the rule permitted an MDS applicant to increase the EIRP of its station, even if it could not protect a neighboring station from interference, so long as it could demonstrate (a) that the resulting interference would be eliminated were the interfered-with station to increase its own EIRP (§21.904(c)(1)); (b) that the interfered-with station could actually increase its transmitter power without running afoul of the Commission's rules (§21.904(c)(2)); and (c) that the applicant agreed to bear the cost of increasing the EIRP of the interfered-with station (§21.904(c)(3)). That rule was eminently fair, maximizing the ability of MDS stations to operate at maximum power, without subjecting any previously proposed or authorized station to a risk of harmful electrical interference.

However, the elimination of Section 21.904(c)(2) undercuts the fundamental fairness of the rule. By removing the requirement that the interfered-with station actually be able to

increase its power without causing interference to others, the new version of Section 21.904(c) would force the interfered-with station to accept harmful interference if that interference theoretically could be eliminated by a power increase, even if it is impossible for the neighboring station to actually increase its power without causing interference! The potential problem associated with the elimination of Section 21.904(c)(2) will increase in magnitude in the future. The expansion of the PSA, the move towards geographic licensing, and the transition to digital technology will all lead to more MDS stations being located in closer proximity one to the other. Indeed, WCAI anticipates that at least some wireless cable systems will be moving towards a distributed transmission system employing multiple transmission cells to blanket an area. Forcing any one of these stations to increase power can have a ripple effect, requiring numerous adjacent channel and co-channel stations to increase power in order to maintain relative desired-to-undesired signal ratios.

Unless all of the power increases can be accomplished, and the proponent of the new station is prepared to bear the cost, it would be absurd to allow a newcomer to construct a station that will result in interference to previously authorized or proposed facilities. WCAI can conjure up no conceivable rationale that would justify such an absurd result. Therefore, WCAI urges the Commission to restore former Section 21.904(c)(2).

F. The Commission Should Clarify That A Wireless Cable System Operator That Currently Both Operates A Wireless Cable System and Holds A Cable Franchise Within A BTA Remains Eligible To Bid For That BTA Authorization.

Under newly-promulgated Section 21.923 of the Rules, “[a]ny individual or entity, other than those precluded by §§ 21.4 and 21.912 of this subpart, is eligible to receive a

Basic Trading Area (BTA) authorization and a station license for each individual MDS station within the BTA.” (emphasis added). While it is rather clear how Section 21.4, which addresses alien ownership and control issues, will be applied under the Commission’s new MDS licensing scheme, there is a need for the Commission to clarify how Section 21.912 will be applied. Specifically, WCAI urges the Commission to declare that while an entity is generally banned from securing a BTA or partitioned service area authorization if it holds a cable franchise in the same area, in those situations where an incumbent is lawfully providing wireless cable service and holds a cable franchise within a BTA, that incumbent entity remains eligible to bid for the master authorization for that BTA and to apply for new facilities within the BTA.

Since it was first adopted in 1990, Section 21.912 has generally barred a cable system operator from either holding a license for an MDS station that has a PSA overlapping its cable service area, or leasing the transmission capacity of such a station from the licensee.^{64/} However, under a variety of circumstances, the Commission has granted exceptions to or waivers of Section 21.912 that permit wireless cable system operators to provide wireless cable service from MDS stations with PSAs that overlap their cable service area. For example, the Commission has exempted from the ban all MDS facilities applied for by cable

^{64/}See *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission’s Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 6410, 6417 (1990)[hereinafter cited as “*Gen. Docket No. 90-54 Report and Order*”]; *Gen. Docket No. 90-54 Order on Reconsideration*, 6 FCC Rcd at 6775-76; *Gen. Docket No. 90-54 Second Report and Order*, 6 FCC Rcd at 6799-6800.

operators or leased by cable operators prior to February 8, 1990 -- the day the Commission first proposed to bar cable access to MDS facilities.^{65/} In addition, until the passage of the 1992 Cable Act, the Commission permitted MDS channels to be licensed or leased to a cable operator where the "overbuild exception" applied (*i.e.* where there were at least two franchised cable operators serving the area overlapped by the MDS PSA).^{66/} While the Commission felt compelled to eliminate the overbuild exception in implementing the 1992 Cable Act,^{67/} consistent with Congressional intent^{68/} the Commission grandfathered those overbuild situations existing prior to the October 5, 1992 enactment of the 1992 Cable Act.^{69/} More recently, the Commission granted a blanket temporary waiver of Section 21.912 and indicated that it would consider permanent waivers in those cases where the expansion of the MDS PSA created an overlap with a cable franchise that had not previously existed.^{70/}

The problem, simply put, is that many of the wireless cable systems that are operating

^{65/}See *Gen. Docket No. 90-54 Second Report and Order*, 6 FCC Rcd at 6800.

^{66/}See *Gen. Docket No. 90-54 Report and Order*, 6 FCC Rcd at 6417.

^{67/}See *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions*, 8 FCC Rcd 6828, 6843 (1993).

^{68/}Section 613(a)(2)(A) specifically mandated that the Commission "shall waive the requirements of this paragraph for all existing multichannel multipoint distribution services . . . which are owned by a cable operator on the date of enactment of this paragraph." 47 U.S.C. § 533(a)(2)(A).

^{69/}See *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions*, 8 FCC Rcd 6213 (1993).

^{70/}See *Gen. Docket No. 90-54 Second Reconsideration Order* at ¶ 31.

under exceptions to or waivers of Section 21.912 or that are lawfully operating cable and wireless systems in the same BTA need to add additional MDS channel capacity in order to be fully competitive. The Commission previously has “acknowledged that wireless cable operators endeavoring to compete with wired cable systems, whose number of channels often exceeds 50, must have access to as many of the available 32 or 33 ITFS and MMDS channels as possible in a given market.”^{21/} Indeed, the *MDS Auction Order* recognizes that “wireless cable operators must have access to as many available channels as possible in order to meet subscriber demand and compete with wired cable television systems in the same area.”^{22/} If the Commission bans those who are today lawfully operating wireless cable systems from securing BTA authorizations, it will prevent the very accumulation of channels that the *MDS Auction Order* purports to promote.^{23/}

Just last year, the Commission properly recognized that waiver of Section 21.912 is appropriate where warehousing concerns are not implicated and grant of the waiver would promote competitive wireless cable service.^{24/} Indeed, in the *Gen. Docket No. 90-54 Second*

^{21/}*Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service*, 9 FCC Rcd 3360, 3364 (1994).

^{22/}*MDS Auction Order*, at ¶ 10. See also *Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service*, 9 FCC Rcd 3360, 3364 (1994)(“wireless cable operators endeavoring to compete with wired cable systems, whose number of channels often exceeds 50, must have access to as many of the available 32 or 33 ITFS and MMDS channels as possible in a given market.”)

^{23/}See, e.g., *MDS Auction Order* at ¶ 41.

^{24/}See *People's Cable, Inc. and American Telecasting of Central Florida, Inc.*, 9 FCC Rcd 6101, 6103 (1994).

Reconsideration Order, which was adopted simultaneously with the *MDS Auction Order*, the Commission specifically acknowledged that “the underlying purpose of Section 21.912 [is to] enhance competition by a microwave provider of multichannel video entertainment programming as an alternative for consumers to cable television systems in the same area.”^{15/} Unless the relief requested by WCAI is issued, however, application of Section 21.912 could significantly undercut the ability of several current wireless cable system operators to compete in the marketplace.

G. The Commission Should Clarify That Every MDS Stations Authorized or Proposed Prior To September 15, 1995 Will Be Treated As An “Incumbent.”

The regulatory scheme crafted by the *MDS Auction Order* affords certain rights to the licensees of “incumbent” MDS facilities. Unfortunately, there is an inconsistency in the definition of “incumbent” between the text of the *MDS Auction Order* and the rules contained in Appendix C. In the text of the *MDS Auction Order*, an incumbent is defined as an MDS station that was authorized or proposed “on or before June 15, 1995.”^{16/} However, newly-promulgated Section 21.2 of the Rules defines as an incumbent all those stations “authorized or proposed before September 15, 1995.” Based on informal discussions with the Commission’s staff, WCAI understands that the intention is for Section 21.2 to control. To avoid any future controversy, on reconsideration that Commission should make that intention clear.

^{15/}*Gen. Docket No. 90-54 Second Reconsideration Order* at ¶ 30.

^{16/}*MDS Auction Order* at ¶ 3.

H. The Commission Should Establish A Uniform Expiration Date For All MDS and CITFS Station Licenses Issued To BTA Authorization Holders

Although MDS licenses are generally awarded for a ten year term, the Commission's rules prior to the *MDS Auction Order* provided that all MDS station licenses expired on a common date that is ten years from the last expiration date of MDS licenses.^{77/} Thus, the current term of all incumbent MDS licenses will expire on May 1, 2001, regardless of when the license was awarded. In the *MDS Auction Order*, the Commission has decided on a different approach for MDS station licenses issued to BTA authorization holders. All MDS station licenses issued to a BTA authorization holder will expire simultaneously on the date that is ten years after the Commission declares bidding on the auction for that BTA closed.^{78/} The Commission has determined, and WCAI concurs, that this approach "serves both prospective bidders and the Commission well," for it both provides licensees with a sufficient license period to attract investment in wireless cable and minimizes the regulatory burdens imposed on the Commission's staff at renewal time.^{79/}

The *MDS Auction Order* is silent, however, as to when licenses issued to BTA authorizations holders permitting the commercial use of ITFS frequencies pursuant to Section 74.990 will expire. It is currently the Commission's practice to set CITFS licenses to expire concurrent with the fixed MDS station license renewal cycle (*i.e.* new CITFS licenses are set

^{77/}See 47 C.F.R. 21.45(a)

^{78/}See *id.* at ¶¶ 155-157.

^{79/}See *id.* at ¶157.

to expire on May 1, 2001). WCAI recommends that the Commission amend its rules to provide that the term for CITFS licenses issued to BTA authorization holders will expire ten years after the Commission declares bidding on the auction for that BTA closed. This will not only be consistent with the Commission's past policy of making MDS and CITFS licenses co-terminus, but will provide BTA authorization holders that secure CITFS licenses and the Commission's staff with the very same benefits that the Commission recognizes will flow from the decision to establish a term for MDS station licenses issued to BTA authorization holders ending ten years after the closing of bidding for the BTA authorization.

I. Minor Typographical Errors In the Rules Should Be Corrected.

Finally, the Commission should take advantage of the reconsideration phase of this proceeding to correct certain typographical errors that appear in the rules as published in the *Federal Register*. Specifically,

- Section 21.15(g) should have a period after the second use of "Commission."
- An extraneous "be" appears in Section 21.42(d) that should be deleted.
- In Section 21.931(e), "the" should be substituted for "thee."

III. CONCLUSION.

Once again, the constructive criticisms and suggestions set forth above notwithstanding, the Commission and its staff have done yeoman's service in crafting a new regulatory environment for MDS. With the fine-tuning proposed by WCAI, the Commission will have in place the regulatory foundation necessary for wireless cable to effectively compete in the marketplace for years to come.

Respectfully submitted,

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